

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

HUBER SPECIALTY HYDRATES, LLC

Respondent

and

UNITED STEEL WORKERS,
LOCAL 4880

Case Nos. 15-CA-168733
15-CA-177324
15-CA-179549

Charging Union

and

BRANDON HARMON,

an Individual

Jacqueline Rau, Esq., for the General Counsel.
Charles P. Roberts, III, Esq., for the Respondent.

DECISION

Statement of the Case

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Little Rock, Arkansas, on April 6 and 7, 2017. The United Steel Workers, Local 4880 (the Union) filed the charge in case 15-CA-168733 on February 1, 2016, and an amended charge on February 11.¹ The Regional Director for Region 15 of the National Labor Relations Board (NLRB/the Board) issued the complaint and notice of hearing on May 31. Brandon Harmon (“Harmon”) filed charges in cases 15-CA-177324 and 15-CA-179549 on June 1 and July 6, respectively. The Regional Director for Region 15 of the NLRB issued the order consolidating the complaint, and the consolidated complaint and notice of hearing on September 29. Huber Specialty Hydrates, LLC (Respondent or Company) filed a timely answer to complaint 15-CA-168733 and a timely

¹ All dates are in 2016, unless otherwise indicated.

answer to the consolidated complaint on June 13 and October 13, respectively, denying all material allegations in the complaint and asserting several affirmative defenses.²

The consolidated complaint alleges that Respondent violated the National Labor Relations Act (NLRA/the Act) when (1) on about May 31, Respondent, by Production Manager Jason Smith (“Smith”), prohibited employees from discussing grievances with other employees; (2) about June 1, Respondent issued discipline to its employee Harmon to discourage employees from engaging in concerted activities; and (3) since about December 17, Respondent has failed and refused to bargain collectively with the Union regarding changes to the attendance policy. (GC Exh. 1(m).)³

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a limited liability company with an office and place of business in Bauxite, Arkansas, manufactures and engages in the nonretail sale of alumina trihydrate (“ATH”). Annually, Respondent in conducting its operations, purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Arkansas. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Overview of Respondent’s Operation

Alcoa Corporation (Alcoa), since at least 1973, mined and refined bauxite at the facility at issue in this case. Eventually, Alcoa switched from being a bauxite refinery to a specialty alumina producer. In 2004 Alcoa sold its specialty chemical business to Almatris, Incorporated (Almatris) because it was struggling to remain financially viable. Subsequently, Almatris decided

² On May 8, 2017, the parties filed a joint motion to supplement the formal papers. The motion noted that counsel for the General Counsel inadvertently omitted from its formal papers Respondent’s answers to the complaint and consolidated complaint. Consequently, the joint motion is granted and Respondent’s answers are admitted into evidence and incorporated herein by reference as General Counsel’s exhibits 1(s) and 1(t).

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “Jt. Exh.” for joint exhibit; “GC Exh.” for General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “GC Br.” for the General Counsel’s brief; and “R Br.” for Respondent’s brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid in review, and are not necessarily exhaustive or exclusive.

to exit the specialty aluminas business and sold that portion of its business to Respondent in April 2010. Almatris, however, continued to own and operate a separate part of the facility.

Respondent produces a material used in the paper and wiring industries; and employs about 60 employees in the plant at issue, with 44 to 50 individuals working as bargaining unit hourly employees. The hourly employees work as baggers, operators, and craft personnel (electrical and mechanical). Baggers are responsible for taking in the “dry product” and putting it into 2000-pound super sacks, 50-pound bags or a variation of both. It is essentially an entry-level position with a promotion potential to an operator position. Operators are more experienced and paid a higher wage than baggers because they are more highly skilled. Both baggers and operators have three levels: entry, mid-level, and top.⁴ Progression within each level is based on length of service and skill. Respondent operates four shifts with many hourly employees working a 12-hour shift. However, operators in training worked an 8-hour shift.

Respondent’s management structure consists of a plant manager to oversee the entire plant, a process engineer who supervises the front end of the plant, mechanical engineer who supervises the craft employees, three supervisors to oversee the back end of the plant, one supervisor to oversee the front end of the plant, and an operations manager.

During the period at issue the following individual served in management roles for Respondent: Travas Parker (Travas), operations manager; Craig Parker (Craig), lead supervisor back end operations; Jason Smith (Smith), production manager, back end operations; Alex Hewell (Hewell), back end production supervisor; Roger Wright (Wright), production planner; Brad Martin (Martin), accounting manager; and Jessica Rowan (Rowan), human resources manager.

B. Collective-Bargaining Agreement and the Attendance Policy

At all material times Respondent has recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit:

Hourly production and maintenance workers employed by the Company in its Bauxite, Arkansas, Plant.

(GC Exh. 1(m); Jt. Exh. 1). Since 2009, Albany Bailey (Bailey) has been the president of the local union representing Respondent’s hourly employees. The bargaining unit had been a single unit under Almatris’ ownership. However, with the sale of part of the company to Respondent, the bargaining unit became two bargaining units. Consequently, Respondent and the Union negotiated a separate collective bargaining agreement for the employees acquired by Respondent. The Union and Respondent have entered into successive collective-bargaining agreements (“CBA”), the most recent of which is effective from March 1, 2015 to March 1, 2020. This CBA closely mirrors the contract in place prior to Almatris’ sale to Respondent.

⁴ While the record does not contain a complete description of the operator duties, there was undisputed testimony that top operators are responsible for “[s]pray dryer, flash dryer operations, Pannevis filters, and slurry mixing and loading” and “B milling.” (Tr. 24.)

The attendance policy that was effective August 10, 2012 to February 2016 addressed disciplinary action to be taken based on a specific number of “occurrences” (absences/tardys an employee accumulates over a rolling 12-month period.⁵ Each full-day absence would incur an occurrence; and tardys or leaving work early counted as a one-half occurrence. Five occurrences resulted in a verbal warning. An employee received a written warning after six occurrences, eight occurrences incurred a 1-day unpaid suspension, a 3-day unpaid suspension was meted out after 10 occurrences, and an employee was discharged for accumulating 12 occurrences. The attendance policy also set forth the “call off procedure” employees must follow to provide advance notice prior to “incurring an absence or arriving to work tardy” and the schedule of progressive discipline for failure to adhere to the call off procedure. (Jt. Exh. 2.) Violation of the call off procedure over a rolling 12-month period resulted in discipline or discharge in accordance with the following schedule: one no call employee issued a written warning; two no calls employee issued a 1-day unpaid suspension; three no calls employee issues a 3-day unpaid suspension; and four no calls resulted in discharge. Moreover, “[e]mployees absent for four (4) consecutive work days without notification to their immediate [s]upervisor will be considered to have voluntarily terminated their employment with [Respondent].” Id.

Under Almatris’ ownership, management and labor negotiated for the attendance policy to be separate from the CBA. This agreement to maintain the attendance policy separate from the CBA continued even after Almatris sold a portion of the Company to Respondent. During the 2015 negotiations for the current CBA, the Union proposed changes to the attendance policy. It proposed to: (1) allow for an employee who was tardy for less than an hour to be charged for a one-fourth occurrence; and (2) include the attendance policy as part of the CBA. Respondent balked at those changes so the Union withdrew the proposals. In the course of negotiations, Respondent proposed the deletion of the last two sentences of the management-rights clause under article IV of the CBA. It states in relevant part,

Except as may be limited by provisions of this Agreement, the operation of the plant, and the direction of the working forces, including the rights to lay off, suspend, dismiss and discharge any employee for proper and just cause and to assign employees to tasks as needed are vested exclusively with the Company. This includes the right to adopt reasonable rules and policies subject to at least seven (7) days’ notice prior to implantation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union’s right to promptly grieve the reasonableness of any such rule or policy. However, as the parties have a joint interest in and obligation for workplace safety, drug and alcohol testing will be performed pursuant to the agreed upon policy. The Company will offer employees a last chance agreement in lieu of termination on one occasion unless the employee was in fact impaired on the job. The Company will continue to apply the existing Employee Policy Book.

⁵ The attendance policy that was in effect when Respondent purchased a portion of Almatris was essentially the same as the attendance policy in place in February 2016, except for a few minor adjustments.

(R. Exh. 5.)⁶ The Union agreed to the deletion of the last sentence but refused to accede to the elimination of the preceding sentence. The CBA also gives Respondent the right to “adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, meal and break periods.” (R. Exh. 5, p. 18.)

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C. Respondent’s December 17 Proposed Modification of Attendance Policy

On December 17, 2015, a monthly labor-management central committee meeting⁷ was held to address outstanding workplace issues. In attendance were: Bailey, Local Union Vice President Michael Brian Christian (Christian), Union Representative Oscar Murdock (“Murdock”), Rowan, Plant Manager Frank Viguerie (Viguerie), Travas, and Smith. During the meeting, Rowan announced that Respondent was going to modify the attendance policy and provided the attendees with a draft copy of the new policy. Rowan discussed key proposed changes to the policy and informed the Union that Respondent intended to implement it effective January 1, 2016. The proposed changes included (1) a new call off procedure requiring employees to personally notify their supervisor or manager if they will be absent or tardy; (2) employees who fail appear for work over a period of three consecutive workdays without notification will be considered to have voluntarily terminated their employment instead of after four consecutive work days as stated under the prior policy; (3) inclusion of the provision on “extenuating circumstances” as it pertains to voluntary termination because an employee failed to appear for work over a period of 3 consecutive days without notifying management; (4) the number of occurrences over a rolling 12-month period that will result in discharge is reduced from 12 to 8;⁸ (5) modifying the disciplinary schedule for no call/no show by eliminating the written warning step and discharging an employee after three no call/no show; (6) authorized management the discretion to discharge an employee even if they had not accumulated nine points in a rolling year; (7) failure to work overtime once accepted would result in an occurrence (under the prior policy employee allowed to change mind with an hour of advance notice); and (8) upon return to work from an absence of 3 or more days due to illness, the employee must furnish a return to work statement from a doctor. The union, however, voiced concerns with the changes, specifically: (1) elimination of the 3-day suspension level; (2) reduction in the number of occurrences required for each step of discipline; (3) change in the call off procedure; and (4) inclusion of the provision on “extenuating circumstances.” The union representatives informed Rowan that they would not agree to the new attendance policy without first speaking with the bargaining unit members. The parties agreed that the union would have time to consult with its membership before providing Respondent with further input about the attendance policy changes.

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Respondent did not implement the new attendance policy on January 1. Instead, on January 4, Rowan emailed Bailey writing,

⁶ The current CBA contains the same language as the prior contract except the last sentence in the management clause of the prior CBA is omitted.

⁷ Company management and union representatives have regularly scheduled monthly meeting to discuss and attempt to resolve workplace issues.

⁸ The number of occurrences resulting in a discharge was ultimately reduced to nine.

We haven't heard anything from the union regarding the attendance policy. Do you all have any questions/issues (besides the adjustment on current occurrences to the new policy)?

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(Jt. Exh. 6(a)). On January 5, Bailey responded that the Union had some concerns and suggestions and planned to "have them appropriately bargained and/or grieved if necessary." Id. On the same day, Bailey followed up his response with an email to Rowan, Travas, and Smith with a demand that Respondent cease from unilaterally implementing the new attendance policy until after it had been appropriately bargained. Bailey ended the email with a request that Respondent contact the Union's staff representative to schedule a date for discussion of the matter. (Jt. Exh. 6(b).)

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On January 13, Bailey and Rowan had a brief in-person discussion about the new proposed attendance policy. Bailey also met with Travas and Rowan that same day in Travas' office to discuss Bailey's email demanding to bargain over the proposed changes to the attendance policy; and for management to listen to any input the Union wanted to provide. In the meeting Bailey acknowledged that the management-rights clause gave Respondent authority to implement policy changes, but argued the changes had to be "reasonable" and were still subject to bargaining and the grievance process. After meeting with him, on January 13, Rowan emailed Bailey and reminded him that Respondent had given the Union an opportunity, beyond what was required by the CBA, to respond to the proposed new attendance policy but had not received any specific input from the Union. She also notified him that the new attendance policy would be implemented effective February 1, but Respondent would be "glad" to consider any input the Union provided prior to that date. (Jt. Exh. 6(b).) Within an hour of receiving Rowan's email, Bailey responded to her noting that in the December 17, 2015 central committee meeting, the Union had communicated several specific issues and concerns it had with the new attendance policy. Moreover, Bailey reiterated that the matter had to be bargained over and if Respondent refused the Union would take "appropriate action." Id.

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On January 14, Rowan emailed Bailey that the CBA's management-rights clause, "is a clear and unmistakable waiver of the Company's obligation to bargain over adopting policies." She continued by informing Bailey that although the CBA does not require it, Respondent would provide the Union with an additional week to submit input after which the policy would become effective February 1. Approximately an hour later, Bailey emailed Rowan a response. In his email, Bailey refuted Respondent's view that the Union had waived its right to bargain over the changes to the attendance policy. Moreover, he argued that article XXIV of the CBA protected the Union's right to bargain over the issue. Again, Bailey demanded that Respondent "cease any unilateral change and desist from implementation until bargaining has reached completion." (Jt. Exh. 6(b).) On January 14, the Union filed a grievance charging that Respondent's change to the attendance policy violated the CBA. Respondent did not respond to the grievance.

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E. January 20 Central Committee Meeting

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On January 20, another central committee meeting was held. In attendance were: Rowan, Bailey, Viguerie, Travas, Brad Martin, Christian, and Murdock. Although the new attendance policy was not on the agenda, Rowan informed the Union that its input on the subject had been

considered and the proposed attendance policy that was shown to the union at the December 17, 2015, meeting had been revised in consideration of the Union's suggestions and Respondent's own internal deliberations. Except for telling the Union that the number of occurrences leading to discharge had been increased from eight to nine, Rowan did not share with the Union the other revisions that were made to the attendance policy.

F. January 28 Meeting Between Respondent and the Union

On January 28, the Union and Respondent held a third-step grievance hearing to address grievance unrelated to the attendance policy issue. Representing the Union in the grievance hearing was: Bailey, Christian, and Michael Martin (Martin), a union staff representative. Rowan and Travas represented Respondent. At some point in the grievance hearing, Martin asked Rowan if Respondent was prepared to bargain over the new attendance policy. Rowan responded no. Martin told her that if Respondent continued to refuse to bargain over the issue, the Union would have to file a complaint with the NLRB. Rowan did not respond.

At the conclusion of grievance hearing, Rowan and Baily went into Bailey's office where she showed him the draft copy of the revised attendance policy. Bailey expressed dissatisfaction with several points in the draft policy. He did notice, however, that Bailey had made some changes to the draft to accommodate complaints the Union had voiced at earlier meetings on the topic. Rowan made notes on the revised attendance policy in response to Bailey's concerns and issues identified by management. (R. Exh. 12.) Bailey left the meeting with the understanding that Respondent still intended to implement the new attendance policy February 1, despite the union's concerns. On January 29, Rowan issued a memorandum to the hourly employees notifying them that the attached attendance policy would be implemented effective February 1. (Jt. Exh. 8.)

G. Brandon Harmon Issued Discipline

1. Harmon's employment history

Harmon, a top operator, was initially hired in September 2013 to work for Respondent as a bagger. In February, he was promoted to an entry-level operator position. As a production employee, Harmon would normally work a 12-hour shift. During the relevant time period, however, Harmon was an entry-level operator and still in training. Consequently, he worked an 8-hour shift from 7 a.m. to 3 p.m.

2. Events of May 31

On the morning of May 31, Craig learned of two situations that would negatively impact the plant's production that day. The first was that one of the robotic machines was inoperable which would require employees to stack the pallets manually. Second, the packing area in building 435 was short-staffed which posed a potential safety concern. Consequently, between 8 and 8:15 a.m., Craig went to Kiley Peterson (Peterson), an operator, and instructed him to go to building 435 to help Benji Crawford (Crawford) stack pallets until the robotic situation was resolved. He noticed that Peterson had already stacked 10 50-pound bags, with enough bags stenciled complete about four pallets of work.

After speaking with Peterson, Craig went to the control room. Harmon, Ricky Jackson (Jackson), Chris Skinner (Skinner), Robbie (last name unknown), and Jake Gardner (Gardner) were in the room.⁹ Craig told Harmon that he was reassigning him from his operations duties to bagging (or emptying) the jet mill for the remainder of the day. Harmon did not protest, but rather immediately went to the jet mill. He prepared, filled, and loaded bags onto the pallet until his first 15-minute break at 9 a.m.

At 9 a.m., Harmon went to the break room where he encountered Justin Lane (Lane) and Ryan Moore (Moore). Harmon, admittedly annoyed at having to bag, complained to Lang and Moore about being reassigned to bag the jet mill for the day. He told Lane that the highest bagger on the overtime list should have been offered the work instead of reassigning him to the task. Moreover, Harmon encouraged them to file a grievance over being denied the opportunity to work overtime.¹⁰ While in the break room, Harmon checked the overtime list and learned that Charles (Kirtley) was the highest bagger on the list. At about 9:10 a.m., Harmon left the break room to return to the jet mill. However, he made a brief detour to the 450 break room to get another drink. Harmon arrived back at the jet mill about 9:17 or 9:20 a.m.

Harmon worked until approximately 10 a.m., when he again took another break to go to the bathroom and get a drink of water from the control room. While in the control room with Garner and Jackson, Skinner entered and stated: "We need to shut down the number one spray dryer to get ready to transition to a different product." (Tr. 150.) Although Harmon acknowledged that Skinner's instruction was not directed specifically at him, he decided to interpret it as including him. Consequently, instead of allowing Jackson to assist Garner, Harmon volunteered to help with the task. While Gardner began preparing the dryer for shutdown, Harmon returned to the jet mill. About 10:30 a.m., Craig stopped by the jet mill and asked Harmon how it was going. Harmon mentioned that the machine was bagging a little slow.

Harmon left the jet mill at 11 a.m. to help Gardner finish shutting down the spray dryer, which took about 45 minutes. Thereafter, Harmon returned to the jet mill and, except for his 30-minute lunchbreak at 1 p.m., bagged until the end of his shift. However, he did telephone Smith shortly after he finished shutting down the spray dryer to complain about being assigned to bag the jet mill. Harmon told Smith that he was an operator and believed that by assigning him to bag, management was unfairly taking away an overtime opportunity from baggers. Smith, through a series of rhetorical questions, told Harmon to continue the bagging duties because he was qualified to bag and continued to be paid at an operator's level. Nonetheless, Harmon continued to complain so Smith told him that he would speak with him when he returned from lunch.

As Smith was returning to the plant from lunch, he had a telephone conversation with Craig about Harmon being disgruntled with being on the bagging station. Craig had also received calls from people telling him that Harmon called them in an attempt to get them to "file a

⁹ Jackson and Garner were top operators; and Skinner was Harmon's direct supervisor. While Craig testified that Robbie (last name unknown) was in the room, Harmon did not mention him. There was, however, no evidence disputing Craig's testimony on this point.

¹⁰ Generally, employees are placed on the overtime list according to seniority and job classification. (Tr. 27-8, 131-2.)

grievance on missing overtime.” (Tr. 245.) Smith told him that he was going to speak with Harmon about the situation. When he got into the building, Smith encountered Harmon coming out of the 450 control room.¹¹ Harmon repeated his gripe about being assigned to bagging and that he was “stealing” overtime from other baggers. Smith again told him that he had not been
 5 downgraded; continued to get an operator’s pay; was qualified to run the machine so it was unnecessary to call someone from the overtime list to bag. Harmon responded that he disagreed, at which point Smith told him, “Hey, Brandon, you know, I need you on the spout, putting the bag on the spout. I don’t need you on your phone calling me and other people trying to get them to file grievances and stuff.” (Tr. 244.) The conversation ended with Smith telling Harmon, “I
 10 need [you] to [put] bags on the spout.” (Tr. 244.) They departed and Harmon returned to the jet mill. Towards the end of Harmon’s shift, he made two telephone calls to baggers encouraging them to file a grievance over being denied the opportunity to work overtime. Although Harmon was able to complete 30 bags, the jet mill was not empty by the end of his shift.

15 *H. Harmon’s Conversation with Kirtley*

On June 1, Harmon returned to his regular operator duties. While on his first workbreak at about 9 a.m., Harmon spoke with Kirtley in the break room and told him that the previous day he had to perform bagger duties. He complained to Kirtley that despite Kirtley being the first
 20 bagger on the overtime list, he was not given the overtime opportunity because management reassigned Harmon to perform bagger duties. Kirtley responded that he was going to file a grievance because he was denied the overtime opportunity. The Union filed a grievance on behalf of Kirtley alleging that Respondent violated the CBA because it assigned an operator to perform a bagger function instead of utilizing the bagger overtime list. Respondent denied the
 25 grievance at the second-step grievance process. In total, the Union made four verbal demands to bargain and three written request to bargain over the Respondent’s unilateral changes to the attendance policy. Respondent refused by insisting it was not obligated to bargain over the position because of the management-rights clause. However, Respondent considered and allowed some limited input from the Union regarding Respondent’s changes to the attendance
 30 policy.

I. Harmon Issued Discipline on June 1

On June 1, Craig arrived for work at approximately 6:30 a.m. for a managers’ meeting.
 35 During the meeting, his supervisor asked for an updated on completed tasks from the previous day. Craig, however, could not give him an accurate accounting because he could not locate Harmon’s May 31 productivity report. He later confronted Harmon about his missing paperwork. Harmon told Craig that he did not complete the report because there were not any forms available. He responded that Harmon could print a form off of the computer. He waited
 40 while Harmon printed, completed, and gave him the form.

¹¹ It is undisputed that Harmon and Smith had a discussion about Harmon’s displeasure with being assigned to bag the jet mill. However, there is a dispute over what time the conversation occurred. Harmon claimed they spoke about 9:10 a.m. as he was leaving the break room. Smith places the conversation about noon, immediately after he returned from his lunchbreak. I credit Smith’s testimony on this point because it was more detailed and consistent with the overall evidence.

After speaking with Harmon and getting his productivity report, Craig took steps to independently assess the amount of work that had been completed the previous day. He counted the pallets in the warehouse. Next, Craig spoke with Fitzgerald Williams (Williams), the bagger on the nightshift, about the amount of work he had performed on May 31. Williams had only completed one pallet because his supervisor reassigned him to other duties. He also did not experience any problems with the bagging machine. He spoke with the “guy” bagging on the jet mill May 30 who also reported that he had not experienced any problems with the machine. Likewise, Craig confirmed the baggers production for the period May 29—31 by speaking with them, and reviewing the productivity report Harmon submitted for May 31. Moreover, the jet mill productivity reports for the period May 29–31 confirm Craig’s testimony about the baggers’ output for this period.¹² (R. Exhs. 9, 10, 11.)

On May 31, Craig met with Travas and Smith about Harmon’s productivity. They determined that Harmon should be issued discipline for failing to fully perform his duties and also failing to complete his productivity report in a timely manner. Craig and Smith consulted with Rowan on the proposed discipline because she had to review and approve all discipline issued to employees. Rowan agreed with the proposal to issue Harmon a written discipline. On June 1, Harmon was issued a written warning. (Jt. Exh. 11.) On the same date, Christian filed a grievance on behalf of Harmon because he was issued the discipline. Respondent denied the grievance.

III. Discussion and Analysis

A. Respondent’s Unilateral Change to the Attendance Policy

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act when, since about December 17, 2015, Respondent failed and refused to bargain with the Union regarding changes to the attendance policy. The General Counsel argues that the changes to the attendance policy were mandatory subjects of bargaining; Respondent’s changes to the attendance policy were material, substantial and significant; and the Union did not waive its right to bargain over the changes to the attendance policy.

Respondent denies that its action violates the Act. Instead, Respondent counters that the waiver standard is inapplicable in this case and the Board should adopt the “contract coverage” analysis; and assuming *arguendo* that the waiver standard is applicable, the Union waived its right to bargain over the attendance policy changes.

An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain

¹² In his brief, counsel for Respondent contends that Craig reviewed the jet mill productivity reports for May 29–31. The General Counsel disputes this point. Significantly, Craig attested that he did not review the May 29 report when contemplating issuing Harmon discipline. Moreover, Craig testified that he spoke with the baggers whose productivity is reflected in the reports at R. Exhs. 9, 10, 11 but does not explicitly testify that he reviewed the reports as part of his research into Harmon’s work activities. (Tr. 228–232.) Based on a review of the testimony Respondent cites (Tr. 13, 226–229.) to support its position and the aforementioned discussion, I find that the only productivity report Craig viewed as part of his investigation was the May 31 report that Harmon gave him.

over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). “Under the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.”

5 *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The duty to bargain, however, only arises if the changes are “material, substantial and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this element of the *prima facie* case. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). In order to find that an employer made unilateral
10 changes to an employee benefit in violation of the Act, it must be shown that (1) material changes were made to the employees’ terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *San Juan Teachers Assn.*, 355 NLRB 172, 175 (2010). *Alamo Cement Co.*, 281 NLRB
15 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001); *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011).

The good-faith standard is used by the courts and the Board to determine if the parties have met their obligation to bargain under the Act. The Board takes a case-by-case approach in
20 assessing whether parties have met, conferred, and negotiated in good faith. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (the Court adopted the “good faith” standard for an employer’s conduct); *St. George Warehouse, Inc.*, 349 NLRB 870 (2007) (the Board reviews the totality of the employer’s conduct in deciding if the employer has satisfied its obligation to confer in good faith).

25 An employer to a contractual agreement may unilaterally take certain actions that result in changes to the terms and conditions of employment if there has been a “clear and unmistakable” waiver of the Union’s right to bargain over the changes. *Pavilions at Forrestal*, 353 NLRB 540 (2008) (impasse irrelevant where employer unilaterally implemented new health
30 insurance plan without providing union information, notice and opportunity to bargain concerning new plan); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008) (employer prematurely declared impasse and unilaterally implemented changes in health insurance and other benefits where union requested and employer agreed to schedule subsequent bargaining session, union indicated willingness to “look at other plans,” and union stated that it
35 would prepare counterproposal). The “clear and unmistakable” standard requires that the contract language is specific, or it must be shown that the subject alleged to have been waived was fully discussed by the parties and the party alleged to have waived its rights did so explicitly and with the full intent to release its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

40 Based on the record of evidence, I find that Respondent unilaterally changed its attendance policy without providing the Union with an opportunity to bargain.

In *Axelson, Inc.*, 234 NLRB 414, 415 (1978), the Board defined mandatory subjects of bargaining as,¹³

those comprised in the phrase “wages, hours, and other terms and conditions of employment” as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

The Board has consistently held that attendance rules and issues related to attendance are mandatory subjects of bargaining. *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982) (attendance rules and policies are “unquestionably mandatory subjects of bargaining”), enf’d. 772 F.2d 1120 (3d Cir. 1983); *Dorsey Trailers*, 327 NLRB 835, 853 fn. 26 (1999) (“An employer’s attendance policy has long been held to be a mandatory subject of bargaining”), enf’d. in relevant part 233 F.3d 831 (4th Cir. 2000); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (employer’s absenteeism policy is a mandatory subject of bargaining). Consequently, I find, and Respondent admits that the unilateral change to its attendance policy is a mandatory subject of bargaining. (GC Exhs. 1(m), 1(s), 1(t).) I also find, and Respondent does not dispute, that the unilateral change to Respondent’s attendance policy and the implementation of the revised attendance policy are material, substantial, and significant. See, *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), enf’d. 454 F.2d 303 (7th Cir. 1971) (employer’s establishment of discipline based on specified number of absences where none previously existed was a significant change); *Tenneco Chemicals*, 249 NLRB 1176, 1179– 1180 (1980) (exposing employees to possible discipline based on a supervisor’s discretionary application of a work rule is material, substantial and significant).

Next, I turn to the question of whether the Union waived its right to bargain over the unilateral changes to the attendance policy. Respondent advances several arguments: (1) based on the facts of the case, the correct analysis to use for this issue is the “contract coverage” analysis applied by the D.C. Circuit, First Circuit, and Seventh Circuit; (2) the correct analysis is whether Respondent satisfied the procedural conditions in the CBA; and (3) even under the “waiver” standard, the evidence shows the union waived its right to bargain over changes to the attendance policy. The General Counsel contends that Respondent’s bargaining obligation was not waived by the CBA; and the union has not engaged in any conduct that waived its right to bargain over the changes to attendance policy.

In its post-hearing brief, “Respondent contends that the time has come for the Board to adopt the “contract coverage” analysis in cases where an employer defends based on an assertion that it possessed a contractual right to take the action it took.” (R. Br. 21.) I reject Respondent’s argument on this point. The Board has declined to follow the D.C. Circuit, First Circuit, and Seventh Circuit in substituting the “contract coverage” analysis for the “clear and unmistakable waiver” standard. The General Counsel correctly notes that the Supreme Court has affirmed the “clear and unmistakable waiver” standard, and it continues to be current Board law. *NLRB v. C&C Plywood*, 385 U.S. 421 (1967); *Provena St. Joseph Medical Center*, 350 NLRB 808

¹³ *Operating Engineers Local 12 (Association General Contractors of America, Inc.)* 187 NLRB 430, 432 (1970).

(2007). Consequently, I am required to follow Board precedent where neither the Board, nor the Supreme Court has reversed. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984).

5 Second, Respondent asserts that because the CBA contains a specific bargaining procedure to follow when an employer intends to take unilateral action, the clear and unmistakable waiver standard is inapplicable. Instead, Respondent insists that “the issue becomes one of whether the employer satisfied the procedural conditions set forth in the contract.” (R. Br. 18.) In advancing its argument, Respondent cites *Howard Industries*, 365 NLR
10 No. 4 (2016), and *Ingham Regional Medical Center*, 342 NLRB 1259 (2004).

In *Howard Industries*, the employer, over a 9-year period, had a policy providing for the distribution of hams and/or turkeys during the Thanksgiving and Christmas holidays to all full-time employees, even employees out on medical leave or workers’ compensation. The employer
15 subsequently changed the policy and exempted certain employees from receiving the Thanksgiving turkeys and Christmas hams. The parties’ CBA established a procedure for the employer to follow when it wanted to change an existing policy, create a new policy, or modify job performance standards. Consequently, when the union made a demand that the employer bargain over the unilateral change in holiday meat distribution, the employer explained that
20 because it followed the procedure set forth in the CBA, it was not required to bargain. The administrative law judge declined to analyze whether there was a unilateral change about a mandatory subject of bargaining and if there was a clear and unmistakable waiver of the right to bargain. The administrative law judge, instead, found that the determinative factor was whether the employer’s action was protected by the CBA. Ultimately, the judge ruled the employer’s
25 action did not violate the Act, and the Board adopted the judge’s decision.

In *Ingham*, the employer unilaterally assigned bargaining unit work to its subcontractor. The employer declined to accede to the union’s demand to bargain over the issue. Instead, the employer argued that the parties’ CBA reserved exclusively to Respondent the decision to
30 subcontract bargaining unit work. The Board adopted the administrative law judge’s finding that, under the clear and unmistakable waiver standard, the union had waived its right to bargain over the issue.

Based on a review of the evidence and case law, I reject Respondent’s argument and find
35 that the clear and unmistakable waiver standard is applicable in this case. Likewise, I find that Respondent’s reliance on *Howard Industries* and *Ingham* is misplaced. In fact, *Ingham* stands in stark contrast to Respondent’s position. The administrative law judge specifically analyzed the case under the standard that a party’s bargaining obligation is only waived by contractual language if the language is a “clear and unmistakable waiver.” *Ingham* at 1017. Moreover, the
40 Board adopted the administrative law judge’s finding and also noted, “[N]o party has excepted to the judge’s finding that the “clear and unmistakable” waiver analysis is applicable in this case.” *Ingham* at fn. 1.

Howard Industries is inapposite because the employer relied on language in a specific
45 provision in the CBA that dealt with policy changes to support its position that its unilateral change of a company policy was not a violation of the Act. The judge, in dismissing the complaint, likewise determined that looking at the specific provision of the CBA was appropriate

because it specifically addressed the procedure to follow for changing an existing policy, creating a new policy or modifying job performance standards. In the matter at hand the management-rights clause is the focus of the issue and not a specific provision of the CBA which addresses attendance issues. Further, unlike the facts in *Howard Industries*, Respondent in this case acknowledged that the attendance policy was not part of the CBA. Although the union, during contract negotiations in 2015, sought to include the attendance policy as part of the CBA, Respondent refused. Consequently, unlike the facts in *Howard Industries*, I find that the management-rights clause is not determinative of whether this case should be analyzed under the “clear and unmistakable waiver” standard or analyzed based on whether Respondent fully complied with the procedure set forth in the CBA for implementing the revised attendance policy.

According to Respondent, even assuming *arguendo* that the “clear and unmistakable waiver” standard is appropriate, the facts establish that the union waived its right to bargain over the issue because: (1) a combination of language in the CBA and the management-rights clause gave Respondent the right to act unilaterally with respect to the attendance policy; and (2) the parties’ bargaining history further confirms the Union’s waiver.

Respondent references the Board’s decision in *Provena* to support its case. In *Provena*, the employer unilaterally implemented a staff incentive policy and a new attendance and tardiness policy. The Board rejected the contract coverage standard and reaffirmed that it would continue to apply the “clear and unmistakable” waiver standard. In so doing, the Board determined that the union did not waive its right to bargain over the implementation of the staff incentive policy because (1) the parties’ CBA did not include an express provision on incentive pay; and (2) there was no evidence that the parties’ bargaining history showed that the matter was fully discussed or that the union intentionally surrendered its right to bargain over the topic. However, with respect to the attendance and tardiness policy, the Board found that, read together, several parts of the CBA’s management rights clause explicitly authorized the employer to act unilaterally.

Respondent argues that in the matter at hand, the combination of provisions in the CBA is at least as compelling as those in *Provena*. Specifically, Respondent points to the following language in the CBA: (1) Respondent is authorized to “adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods”; (2) Respondent is given the right “to adopt reasonable rules and policies”; (3) Respondent is authorized “to suspend, dismiss and discharge any employee for proper and just cause”; and (4) Respondent must give the Union seven days advance notice and an opportunity for input prior to a rule or policy modification. (Jt. Exh. 1, pp. 3, 4, 16.) The General Counsel argues that Respondent’s reliance on *Provena* is misplaced because the management- rights clause at issue lacks the specificity of the *Provena* clause. I agree.

In *Provena*, the Board noted that when “a “management-rights” clause is the source of an asserted waiver, it is normally scrutinized by the Board to ascertain whether it affords specific justification for unilateral action.” at 811. The Board, therefore, held that Respondent had a right to implement the new disciplinary policy on attendance and tardiness without first bargaining with the Union because the management-rights clause, agreed to by the Union, specifically provided that the employer had the right to “change reporting practices and procedures and/or to

introduce new or improved ones,” to make and enforce rules of conduct,” and “to suspend, discipline, and discharge employees.” *Provena* at 815. Consequently, the Board found that by agreeing to this combination of provisions the Union had waived its right to bargain over the new the policy and its implementation. Unlike *Provena*,¹⁴ here, the management-rights clause fails to specifically reference attendance. Instead it merely notes that Respondent has the “right to adopt reasonable rules and policies.” (Jt. Exh. 1.) The Board had held that this language is insufficient to meet the “clear and unmistakable waiver” standard. See *Dorsey Trailers, Inc.*, at 836. Moreover, Respondent’s attempt to combine provisions of the management rights clause with language from different sections of the CBA to support its argument that the Union waived its right to bargain over the issue is disingenuous since Respondent admitted that its refusal to bargain was based solely on the management-rights clause. (Jt. Exh. 6(b).) Based on the evidence and Board law, I find that the facts in this case dictates a different result than that in *Provena* because, for the reasons previously addressed, the language in the management rights clause at issue is far too vague and general to support a finding that by agreeing to the clause the Union had clearly and unmistakably waived its right to bargain over attendance issues.

Next, I turn to whether the parties’ bargaining history establishes that the Union waived its right to bargain over attendance issues. “Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.” *Provena* at 822; *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1983). In support of its argument that the Union’s past actions are proof of the Union’s relinquishment of its right to bargain over the attendance policy, Respondent notes: (1) it unilaterally, and without objection from the Union, modified the cell phone policy, a shoe policy and a tobacco (spittle) policy by first giving the union seven days advance notice to provide input prior to its implementation; (2) in the 2015 contract negotiations, the Union attempted to incorporate the attendance policy into the CBA; and (3) the Union agreed to the deletion of language from article 4.01. The General Counsel and the Union counter: (1) it allowed Respondent to implement changes, without bargaining, to the cell phone, shoe, and tobacco policies because they were the types of “reasonable” changes allowed under the management rights clause; (2) “in contract bargaining, when the attendance policy was discussed, the Union always asserted that it had the right to bargain over the attendance policy”;¹⁵ and (3) the Union agreed to the deletion of a sentence in management rights clause because Respondent assured the Union that it did not foresee any changes to any policies. Moreover, the General Counsel summarily dismisses Respondent’s defense stating, “[T]he Union has not engaged in any other conduct that waived its right to bargain over the attendance policy. Even in contract bargaining, when the attendance policy was discussed, the Union always asserted that it had the right to bargain over the attendance policy.” (GC Br. 24.)

I find that the bargaining history of the parties does not establish that the Union waived its right to bargain over the new attendance policy. The Board has consistently held that prior acceptance of an employer’s unilateral actions on a specific issue generally does not, without more, establish that the union waived its right to bargain over future action by the employer in

¹⁴ The management-rights clause in *Provena* specifically references attendance by setting forth the language “change reporting practices and procedures and/or to introduce new or improved ones.” at 815.

¹⁵ GC Br. 24.

that matter. *Ciba-Geigy Pharmaceuticals* at 1017 (union's acquiescence in employer's past unilateral changes in other plant rules does not constitute waiver by union of right to bargain about employer's implementation of new plant rule); *Murphy Diesel Co.*, supra (the union's prior acceptance of the employer's unilateral promulgation of written work rules on, among other subjects, lateness and absenteeism did not constitute a relinquishment of the union's right to bargain about the employer's subsequent unilateral promulgation of substantially modified, stricter rules concerning lateness and absenteeism.); *NLBR v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) (a right previously waived is not necessarily lost forever).

Moreover, the Union's agreement to withdraw, during the 2015 contract negotiations, its demand to have the attendance policy incorporated into the CBA; and its agreement to delete the last sentence of the management-rights clause in the prior contract are likewise insufficient to prove that the parties' bargaining history shows that the union waived its right to bargain over the new attendance policy. The attendance policy was a carry-over from the prior contract bargained for between Almatris and the Union. There is no evidence that at the time Respondent purchased Almatris, the union "consciously yielded or clearly and unmistakably waived its interest" in regard to bargaining about the attendance policy. Further, there was undisputed testimony that Respondent, although it refused to agree to the Union's demand to incorporate the attendance issue into the CBA and the Union agreed to delete the last sentence of the management rights clause, gave the union assurance that it foresaw no changes to the policies in the employee policy book, which included the attendance policy.

Based on the evidence, I find that the evidence is insufficient to find that the Union explicitly waived its rights with the full intent to release its interest in the matter. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the attendance policy without first bargaining over the changes with the Union.

B. Alleged Prohibition on Employees from Discussing Grievances

The complaint alleges, in part, that on about May 31, Respondent unlawfully prohibited employees from discussing grievances with other employees. The General Counsel argues that Smith's mere utterances to Harmon are a violation of the Act because it "directly prohibited Harmon from engaging in his Section 7 rights." (R. Br. 26.) Respondent counters that considered in context, "any reasonable person would understand that Smith was not prohibiting Harmon from filing grievances. He was prohibiting him from doing anything that would distract from the job to which he was assigned." (R. Br. 27.)

I find that, considering the totality of the circumstances, Smith was not precluding Harmon from exercising his Section 7 rights. It is undisputed that Harmon was upset and irritated about being assigned to bag on the jet mill for 1 day on May 31. The evidence established that Harmon spent a good part of his morning complaining about his temporary job assignment. He groused about his reassignment to several employees and encouraged a couple of baggers to file grievances over the issue. Harmon first complained about bagging to a bagger, Lang, while he was on his morning break at 9 a.m. in the 435 break room. He also told Lang that he had reviewed the overtime list and felt the highest bagger on the list should file a grievance over being denied that opportunity to work overtime. As Harmon headed back to the jet mill from his break, he made a detour and went to control room 450 to get a drink. While in the

control room, he relayed to Garner and Jackson his displeasure about being assigned to bagging. During Smith's lunchbreak, Harmon also called him to state that he was unhappy with his assignment on the bagging station and should be performing operator duties or training. He told Smith that he felt that by being assigned to bag, he was taking an overtime opportunity from a bagger. After short exchange, Smith told him to go back to bagging; and he would talk with Harmon again when Smith returned from lunch.

After he returned from lunch, Smith sought out Harmon to continue their discussion about Harmon's disgruntlement with being assigned to bag. Shortly before speaking with Harmon again, Smith received a telephone call from Craig who informed him that people were telling him that Harmon called them in an attempt to get them to "file a grievance on missing overtime." (Tr. 245.) Smith told him that he was going to speak with Harmon about the situation. When Smith encountered him, Harmon repeated his gripe about being assigned to bagging and that he was "stealing" overtime from other baggers. Smith again told Harmon that because he continued to get an operator's pay and was qualified to run the machine, it was unnecessary to call someone from the overtime list to bag. Harmon responded that he disagreed, at which point Smith told him, "Hey, Brandon, you know, I need you on the spout, putting the bag on the spout. I don't need you on your phone calling me and other people trying to get them to file grievances and stuff." (Tr. 244.) The conversation ended with Smith telling Harmon, "I need [you] to [put] bags on the spout." (Tr. 244.) Towards the end of Harmon's shift, he made two telephone calls to baggers encouraging them to file a grievance over being denied the opportunity to work overtime; and a call to another bagger the following day encouraging him to file a grievance.

The General Counsel would have one believe that the mere utterance of the sentences is a violation of the Act. However, the context within which the words were spoken is relevant and significant. Prior to his conversation with Smith, Harmon had made it clear to other employees that he was upset and irritated at being assigned to the jet mill. Smith, prior to telling him to stay off the phone and focus on emptying the jet mill, was also aware of Harmon's complaints about being reassigned to the bagging station in the jet mill. Harmon also spent time performing other activities when he should have been putting the bag on the spout to ensure the product bin was emptied by the end of his shift. He spent at least 45 minutes away from his assigned duties shutting down the spray dryer, although not specifically instructed to perform the task; he took an extra morning break getting a drink and obviously loitering in the break room long enough to be present when Skinner came in to make general remarks about shutting down the spray dryer; and took worktime to call Smith to complain about his assignment, and call a couple of employees to encourage them to file grievances because instead of calling them for overtime Respondent assigned him to perform bagging. It is against this backdrop that Smith told Harmon to focus on completing his job instead of wasting time urging people to file grievances because he was upset about having to work the bagging station. Any reasonable person, including Harmon, would recognize that Smith was simply pointing to a "factual reference to what Harmon was doing in place of his job." He was not trying to restrain or preclude him from filing a grievance but rather attempting to get Harmon to focus on performing his assigned tasks. Moreover, the evidence is clear that Harmon was not and did not feel constrained in the exercise of his Section 7 rights as a result of Harmon's utterances. The evidence shows that after Smith told him to focus on his work instead of trying to encourage baggers to file grievance, Harmon continued to telephone baggers and solicit them to file grievance. He continued to exercise his

Section 7 right the next day when he called Kirtley and told him that he should file a grievance because Respondent refused to give him the opportunity to work overtime on May 31. These are the actions of an employee who felt uninhibited by management in his quest to exercise his Section 7 rights. I find that there is absolutely no evidence that Smith was explicitly or implicitly trying to preclude Harmon from filing or discussing grievances during his breaks or at other non-work periods. See *United States Postal Service*, 350 NLRB 441, 441-442 (2007) (no right to discuss, solicit, and file grievances during worktime).

Viewed through the lens of reason and the law, I find that neither Harmon, nor any reasonable person would perceive Smith's statements as restraining or prohibiting them from exercising their Section 7 rights. Consequently, I find that Respondent did not violate the Act, and recommend that paragraphs 5 and 6 of the complaint be dismissed

C. Harmon Disciplined on June 1

The General Counsel argues that Harmon engaged in protected concerted activity when (1) on May 31, Harmon complained about his work assignment to Lang and told him overtime should have been offered to a bagger instead of assigning the work to him; and (2) on June 1, Harmon told Kirtley that he should file a grievance because but for Respondent assigning him to bagging, Kirtley probably would have been entitled to overtime. Consequently, the General Counsel contends that Respondent's discipline of Harmon constituted a violation of the Act.

Respondent insists that Harmon was disciplined for legitimate reasons. Moreover, Respondent argues: (1) Harmon's actions were not protected activity; (2) evening assuming that Harmon's actions were protected, there is no evidence of animus; and (3) other employees have also been disciplined for poor performance.

The Board applies the *Wright Line*¹⁶ analysis to 8(a)(1) discrimination cases and 8(a)(1) concerted activity cases that involve disputes about an employer's motivation for taking an adverse employment action against employees. *Sabo, Inc. d/b/a Hoodview Vending Co.*, 362 NLRB No. 81 (2015); *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. Under the *Wright Line* framework, as developed by the Board, the elements required for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are union or protected activity, employer's knowledge of that activity, and union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line*, id. However, where "the evidence establishes that the reasons given for the Respondent's action are

¹⁶251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf’d. 705 F.2d 799 (6th Cir. 1982)).

Under the *Wright Line* framework, in order to sustain its initial burden of proof, the General Counsel must first prove that Harmon engaged in a concerted protected activity which was a motivating factor in Respondent’s decision to issue the written warning. The General Counsel argues that Harmon’s discussions on May 31 and June 1 were protected concerted activity because the discussions were an assertion of rights grounded in the CBA and involved a quintessential union activity, filing a grievance. Respondent counters that “soliciting other employees during working time to file grievances is not protected activity.” (R. Br. 28.)

Based on the evidence, I find that Harmon’s discussions constitute concerted protected activity. The Board has consistently held that individual action taken to implement a CBA is protected concerted activity. See, e.g., *Bunney Bros. Construction Co.*, 139 NLRB 1516, 1519 (1962) (an employee’s attempts to enforce an existing CBA is “but an extension of the concerted activity giving rise to that agreement” and thus is protected concerted activity); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984) (employee’s genuine and reasonable belief about a collectively bargained for right is protected concerted activity regardless of whether the belief was accurate); *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54 (2016) (individual employee who invokes a right she genuinely and reasonably believes is grounded in the collective-bargaining agreement engages in protected concerted activity). Likewise, it has been well established that discussions among employees about grievances is a protected activity. Moreover, Respondent admits that Harmon’s discussions about filing grievances occurred only “partially” during his working time; and adds “it is not necessary to determine precisely when his grievance solicitation activities occurred” because Respondent had a legitimate reason for disciplining Harmon. (R. Br. 28.)

Second, it is undisputed that prior to issuing him the written warning, Smith, Craig and Parker, were aware of Harmon’s attempts to persuade other employees to file a grievance because Respondent refused to call overtime. Lastly, I turn to the question of whether the General Counsel has shown that there was union animus on the part of Respondent.

The General Counsel argues that there are several factors which establish union animus: (1) Craig’s admission that his conversation with Smith about Harmon’s protected conduct influenced his decision to discipline Harmon; and (2) the close timing of Harmon’s protected conduct to his discipline. The General Counsel also contends that Respondent conducted a perfunctory investigation into Harmon’s action which is evidence of discriminatory animus. Respondent disagrees and insists that nothing in Smith’s, Craig’s, Travas’ or Rowan’s history of interacting with employees’ who had threatened grievance actions would support a finding of union animus. According to Respondent, Smith’s sole concern was Harmon’s willful refusal to focus on his assigned task, i.e., he needed to have “a bag on a spout.” Moreover, Respondent denies that the timing of the discipline is indicative of animus toward any protected activity; and insists its investigation into Harmon’s actions was deliberative and thorough.

I find the General Counsel's arguments unpersuasive. Counsel for the General Counsel cites to the transcript to support her argument that Craig admitted that his conversation with Smith about Harmon's protected activity influenced his decision to discipline Harmon. (GC Br. 29; Tr. 249.) However, a reading of the testimony on the page cited by counsel for the General Counsel does not support her version. On cross-examination, Craig simply confirms that (1) he contributed in the decision to discipline Harmon; (2) he made his decision after discussing with Travas and Craig on "what had happened the day before"; and (3) he told Travas and Craig about the conversation he had with Harmon on May 31. (Tr. 249.) It is not clear that Craig was admitting he decided to discipline Harmon because he tried to encourage other employees to file grievances. His testimony was vague on exactly what he was referring to when testifying "what had happened the day before." It is just as likely that he could have been referring to the fact that he made his decision about disciplining Harmon after discussing with Travas and Craig that "the day before" Harmon repeatedly tried to avoid performing his assigned task.

I also reject the General Counsel's argument that the timing of Harmon's discipline is evidence of discriminatory animus. Counsel for the General Counsel notes, "Harmon discussed filing grievances with bagger Kirtley around 9:00 am on June 1, 2016. Within hours, Respondent issued a written warning to Harmon." (GC Br. 29.) I find, however, that this statement leaves out other relevant facts which support a finding that Respondent's investigation and subsequent discipline were taken without discriminatory animus. During the daily 6:30 a.m. manager's meeting on June 1, Craig was asked by his manager about the status of the work performed on May 31. He could not give a complete and accurate response because Harmon had failed to complete and submit his daily productivity report. Consequently, Craig took action to determine the prior day's productions by: (1) getting Harmon to complete his productivity report for May 31; (2) counting the pallets that had been completed the previous day; (3) speaking with the night shift employee about problems he might have experienced bagging on May 31; and (4) asking employees who worked the jet mill on May 29 and 30 if they had experienced a problem with the machine being slow. Based on the results of his investigation, Craig spoke with Travas and Smith about Harmon's May 31 performance and decided to issue the discipline. They then consulted with the human resources manager to ensure it was properly issued. Harmon was disciplined quickly because it did not take long for an investigation to reveal that because of his disgruntlement at having to bag, Harmon intentionally failed to perform his job assignment as directed.

Likewise, I find unpersuasive the General Counsel's argument that Respondent conducted a perfunctory investigation into Harmon's performance of May 31. According to the General Counsel, Craig's failure to monitor the jet mill area or monitor Harmon's performance for the rest of the day; and failure to compare Harmon's production level to the productivity reports proves that there was not a meaningful investigation into Harmon's performance on May 31. Craig's supposed failure to monitor the jet mill area and Harmon's performance on May 31 is irrelevant to whether Respondent performed a thorough investigation to support its issuance of written discipline to Harmon. Regarding the thoroughness of the investigation, Craig provided undisputed testimony that during the manager's morning meeting, they discussed the work that was completed the previous day and night. The General Counsel's argument notwithstanding, it is shown that at minimal, Craig reviewed the productivity reports for May 31 so that in the manager meetings he could account for the work that had been completed and the reasons why certain tasks may not have been completed. Craig also personally counted the completed work

product from the prior evening; and spoke with other workers assigned to the jet mill to assess if there had been ongoing issues with the machine's operation. Based on the evidence, I find that Craig took reasonable steps to determine whether Harmon had sufficient time and resources to perform his job or simply failed to complete his work because he was wasting time.

The General Counsel also argues that because other employees have participated in the same conduct as Harmon without punishment this significantly underscores Respondent's discriminatory motive. Pointing to employees Glen Alan Bailey (Bailey) and Mike Halpain (Halpain), the General Counsel contends that this is an example of Harmon being treated more harshly than similarly situated employees. However, Bailey is not similarly situated to Harmon because Craig was not involved in the events surrounding the decision to discipline Bailey. Craig only signed the discipline because the supervisor involved in initiating and authorizing the action was unavailable. Likewise, Craig did not issue Halpain discipline and there is no evidence that Craig was involved in the decision to discipline him. (GC Exh. 24.) There are several instances when employees failed to complete assignments as instructed but, unlike Harmon, were only issued verbal warnings. David Duke (Duke) was given a verbal warning for failing to complete an assigned task over 2 consecutive days. Randall Lambert (Lambert) and Pam Lunsford (Lunsford) were issued verbal warnings for consistently failing to complete the bottom operator reporting duties. Similar to Harmon, Lane and Kirtley were given a verbal and written warning, respectively, for failing to empty the jet mill as assigned. Garner and Jackson were issued a coaching because they did not start the feed pump as directed. I find, however, that each of these instances differs in key respects. Duke's task did not involve Craig or the completion of a task which directly affected the delivery of a product to a customer. Likewise, Lambert's and Lunsford's infractions, failing to complete a report, did not rise to the level of severity as Harmon's failure to complete a production task; and the decision to issue the disciplines was made by Ronnie Tanner (Tanner). Kirtley, like Harmon, was issued a written warning for failing to empty the jet mill. Lane, however, received a verbal warning for the same offense. Neither Kirtley nor Lane was disciplined by Craig for the infractions. Rather Alex Huell (Huell) was the supervisor responsible for taking disciplinary action against them. Unlike Harmon, Garner's infraction was the result of him mistakenly using the wrong filter cloth on one of the machines. There was no evidence that Garner took the action with malicious intent. Rather it was a genuine mistake to which he admitted and took full responsibility. The circumstances surrounding Harmon's action, however, strongly indicate that he deliberately chose to ignore the instructions that he was given because he did not want to work on the jet mill.

Accordingly, I find that the General Counsel has failed to establish its prima facie case; and Respondent's issuance of the written warning to Harmon does not violate Section 8(a)(1) and (3) of the Act. I recommend, therefore, that paragraph 6 of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Huber Specialty Hydrates, LLC, Bauxite, Arkansas, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Steel Workers, Local 4880 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union regarding changes to the attendance policy.

5 4. The above violation is an unfair labor practice that affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as set forth above.

REMEDY

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Having found that Respondent has engaged an unfair labor practice, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Respondent, having discriminatorily made changes to the attendance policy must rescind any and all unilateral changes to the attendance policy, and rescind any discipline issued in accordance with the policy change. Respondent must also bargain on request with the Union about the attendance policy. If employees have been disciplined as a result of the changed attendance policy, Respondent must make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them from the date of the discrimination to the date remedy is effectuated. Reimbursement of lost earnings shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Social Security Administration allocating backpay, if applicable, to the appropriate calendar quarters. Respondent shall also compensate the employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

Order

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Respondent, Huber Specialty Hydrates, LLC, Bauxite, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) modifying an existing collective-bargaining agreement without allowing the United Steel Workers, Local 4880 an opportunity to bargain over changes to the attendance policy.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) refusing to bargain in good faith with the Union over changes to the attendance policy.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, rescind any and all changes to the attendance policy; and rescind any discipline issued in accordance with the policy change. Within 3 days thereafter, notify the employees in writing that this has been completed.

(b) Within 14 days from the date of the Board's Order, bargain in good faith with the Union over changes to the attendance policy.

(c) Make the employees whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days after service by the Region, post at its facilities in Bauxite, Arkansas, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., January 29, 2018



Christine E. Dibble (CED)
Administrative Law Judge

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT alter terms of the collective-bargaining agreement that we have with the Union without consent of or without bargaining with the Union.

WE WILL NOT unilaterally change employees' terms and conditions of employment, including attendance policies, without notice to and without bargaining with the Union.

WE WILL NOT in any like or related manner refuse to bargain collectively and in good faith with the United Steel Workers, Local 4880.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind any and all changes to your terms and conditions of employment that we made without the consent of or bargaining with the United Steel Workers, Local 4880.

WE WILL, make whole, with interest, any employee for loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, upon request, bargain collectively and in good faith with the United Steel Workers, Local 4880.

HUBER SPECIALTY HYDRATES, LLC
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board

F. Edward Federal Building
600 S. Maestri Place, Floor 7
New Orleans, LA 70130-3414

Telephone: (504) 589-6362

Fax: (6504) 589-4069

TTY: (800) 877-0996

Hours of Operation: 8:00 a.m. to 4:30 p.m. CT

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CA-168733 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.